

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

LEE L.,

**Plaintiff,**

CASE NO. C20-5123-MAT

V.

ANDREW M. SAUL,  
Commissioner of Social Security,

**Defendant.**

## ORDER RE: SOCIAL SECURITY DISABILITY APPEAL

Plaintiff proceeds through counsel in his appeal of a final decision of the Commissioner of Social Security Administration (Commissioner). The Commissioner denied Plaintiff's application for Disability Insurance Benefits (DIB) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, this matter is REVERSED and REMANDED for further administrative proceedings.

## **FACTS AND PROCEDURAL HISTORY**

Plaintiff was born on XXXX, 1970.<sup>1</sup> He has a high school diploma and previously worked

<sup>1</sup> Dates of birth must be redacted to the year. Fed. R. Civ. P. 5.2(a)(2) and LCR 5.2(a)(1).

1 as a longshoreman. (AR 172.)

2 Plaintiff applied for DIB in May 2016. (AR 156-59.) That application was denied and  
3 Plaintiff timely requested a hearing. (AR 88-90, 92-98.)

4 On December 4, 2018, ALJ Steve Lynch held a hearing, taking testimony from Plaintiff  
5 and a vocational expert (VE). (AR 33-64.) On January 8, 2019, the ALJ issued a decision finding  
6 Plaintiff not disabled. (AR 15-27.) Plaintiff timely appealed. The Appeals Council denied  
7 Plaintiff's request for review on December 19, 2019 (AR 1-6), making the ALJ's decision the final  
8 decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to this  
9 Court.

10 **JURISDICTION**

11 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

12 **DISCUSSION**

13 The Commissioner follows a five-step sequential evaluation process for determining  
14 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must  
15 be determined whether the claimant is gainfully employed. The ALJ found Plaintiff had not  
16 engaged in substantial gainful activity since December 15, 2015, the alleged onset date. (AR 17.)  
17 At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ  
18 found severe Plaintiff's bipolar disorder, probable personality disorder, and methamphetamine use  
19 disorder. (AR 17-18.) Step three asks whether a claimant's impairments meet or equal a listed  
20 impairment. The ALJ found that Plaintiff's impairments did not meet or equal the criteria of a  
21 listed impairment. (AR 18-19.)

22 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess  
23 residual functional capacity (RFC) and determine at step four whether the claimant has

1 demonstrated an inability to perform past relevant work. The ALJ found Plaintiff capable of  
2 performing a full range of work at all exertional levels, with the following nonexertional  
3 limitations: he can perform entry-level work with no public interaction and only occasional  
4 interaction with co-workers and supervisors. (AR 19.) With that assessment, the ALJ found  
5 Plaintiff unable to perform past relevant work as a longshore worker. (AR 26.)

6 If a claimant demonstrates an inability to perform past relevant work, the burden shifts to  
7 the Commissioner to demonstrate at step five that the claimant retains the capacity to make an  
8 adjustment to work that exists in significant levels in the national economy. With the assistance  
9 of the VE, the ALJ found Plaintiff capable of transitioning to other representative occupations,  
10 such as lab sample courier, office cleaner, and hospital housekeeper. (AR 26-27.)

11 This Court's review of the ALJ's decision is limited to whether the decision is in  
12 accordance with the law and the findings supported by substantial evidence in the record as a  
13 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more  
14 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable  
15 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750  
16 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's  
17 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.  
18 2002).

19 Plaintiff argues the ALJ erred in (1) discounting his subjective symptom testimony, (2)  
20 assessing certain medical evidence and opinions, and (3) discounting lay evidence. The  
21 Commissioner argues that the ALJ's decision is supported by substantial evidence and should be  
22 affirmed.

23 / / /

## Medical opinion evidence

Plaintiff assigns error to the ALJ's assessment of several medical opinions, each of which the Court will address in turn.

## Legal standards

In general, more weight should be given to the opinion of a treating doctor than to a non-treating doctor, and more weight to the opinion of an examining doctor than to a non-examining doctor. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996).<sup>2</sup> Where not contradicted by another doctor, a treating or examining doctor's opinion may be rejected only for "clear and convincing" reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)). Where contradicted, a treating or examining doctor's opinion may not be rejected without "specific and legitimate reasons' supported by substantial evidence in the record for so doing." *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).

## State agency opinion

State agency psychological consultant Michael Regets, Ph.D., opined at the reconsideration level that Plaintiff should have only “minimal contact with [general public], coworkers, and peers.” (AR 84.) The ALJ gave partial weight to this opinion, finding that in light of further evidence that post-dates the State agency review, Plaintiff should have no public interaction whatsoever, and only occasional interaction with co-workers and supervisors. (AR 23.)

Plaintiff argues that the ALJ erred in failing to explain why he rejected Dr. Regets' opinion that Plaintiff should have "minimal contact" with coworkers and peers. Dkt. 11 at 4. But "minimal" is not a term defined by the Dictionary of Occupational Titles; the ALJ's RFC

<sup>2</sup> Because Plaintiff filed disability applications prior to March 27, 2017, the regulations set forth in 20 C.F.R. § 404.1527 and § 416.927 apply to the ALJ's consideration of medical opinions.

1 assessment is arguably consistent with this restriction by specifying that Plaintiff can interact with  
 2 co-workers and supervisors up to one-third of a workday. Because the ALJ's RFC assessment is  
 3 consistent with Dr. Regets' opinion, Plaintiff has not established error in the ALJ's assessment of  
 4 this opinion. *See Turner v. Comm'r of Social Sec. Admin.*, 613 F.3d 1217, 1222-23 (9th Cir. 2010)  
 5 (ALJ properly incorporated opinions by assessing RFC limitations "entirely consistent" with  
 6 limitations assessed by physician).

7 Kathleen Mayers, Ph.D.

8 Dr. Mayers performed a psychological examination of Plaintiff in January 2017 and wrote  
 9 a narrative report describing his symptoms and limitations. (AR 265-70.) Dr. Mayers' medical  
 10 source statement reads in its entirety:

11 The claimant is a 46-year old male who reports a history of legal problems and  
 12 impulse control difficulties. He is a registered sex offender. He is somewhat able  
 13 to interact with others in a work situation, but when criticized, he tends to respond  
 14 intensely. He was able to perform three-stage directions. [Mental status  
 15 examination] indicated that his vocabulary and concentration were average. His  
 16 fund of knowledge was fair to average. His abstract thinking skills and judgment  
 17 were fair. His memory skills ranged broadly from poor to average for these tasks.  
 18 His insight was limited. He would be able to tolerate minor changes in a work  
 19 situation.

20 (AR 270.)

21 The ALJ gave partial weight to Dr. Mayers' opinion, finding that the overall record  
 22 suggested that Plaintiff was capable of performing unskilled work with no public interaction and  
 23 only occasional interaction with co-workers and supervisors. (AR 23.) Plaintiff argues that the  
 24 ALJ erred in failing to explain why he did not account for Dr. Mayers' opinion that Plaintiff could  
 25 tolerate only minor changes in the work setting. Dkt. 11 at 6.

26 The Commissioner argues that unskilled work necessarily involves "very little if any"  
 27 changes in a work setting. Dkt. 12 at 10 (citing 20 C.F.R. § 404.1568(a) (defining unskilled work

1 as “work which needs little or no judgment to do simple duties that can be learned on the job in a  
 2 short period of time”). This argument is not persuasive because that regulation does not explicitly  
 3 suggest that unskilled work involves few changes in a work setting, and Social Security Ruling  
 4 85-15 provides that “the basic demands of competitive, remunerative, unskilled work include the  
 5 abilities . . . to deal with changes in a routine work setting on a sustained basis.” *See* 1985 WL  
 6 56857, at \*4 (Jan. 1, 1985).

7 Dr. Mayers opined that Plaintiff could handle minor changes in his work situation, but the  
 8 ALJ did not include this restriction in the RFC assessment or VE hypothetical, and thus it is not  
 9 clear that the jobs identified at step five would be consistent with a limitation to only minor changes  
 10 in the work setting. This case must be remanded for the ALJ to reconsider Dr. Mayers’ opinion  
 11 regarding Plaintiff’s ability to handle minor changes in the work setting, and either credit that  
 12 opinion or provide legally sufficient reasons to discount it.<sup>3</sup>

13 Richard Kirkpatrick, M.D.

14 Dr. Kirkpatrick, Plaintiff’s primary care provider, completed a number of form opinions  
 15 describing Plaintiff’s physical and mental symptoms and limitations. The ALJ rejected all of them  
 16 and provided at least one valid reason to do so, rendering harmless errors in the other lines of  
 17 reasoning. (AR 23-25.)

18 Specifically, the ALJ noted that although Dr. Kirkpatrick opined that Plaintiff had disabling  
 19 mental limitations (AR 272, 450-51), Dr. Kirkpatrick’s treating notes did not reference any  
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21       <sup>3</sup> Although Plaintiff requests that this error be remedied by a finding of disability, the Court finds  
 22 that a remand for further proceedings is appropriate because it is not clear on this record whether the  
 23 limitation to minor changes in the work setting would be disabling. Because further proceedings would  
 serve a useful purpose, the Court declines to order a remand for a finding of disability. *See Treichler v.*  
*Comm’r of Social Sec. Admin.*, 775 F.3d 1090, 1103-04 (9th Cir. 2014).

1 remarkable psychiatric findings. (AR 23 (citing AR 262-64, 353-82).) Indeed, Dr. Kirkpatrick's  
2 notes indicate only normal findings as to judgment, insight, mood, and affect, even during an  
3 appointment addressing an anxiety attack in connection with using methamphetamine and energy  
4 drinks (AR 362-64). (See AR 262-64, 353-82.) The inconsistency between Dr. Kirkpatrick's  
5 opinion and his treating notes, in the context of Dr. Kirkpatrick's failure to explain any of the  
6 checkboxes on the mental opinion, is a valid reason to discount Dr. Kirkpatrick's opinion regarding  
7 Plaintiff's mental limitations. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (not  
8 improper to reject an opinion presenting inconsistencies between the opinion and the medical  
9 record).

10 As to Dr. Kirkpatrick's opinion regarding Plaintiff's physical limitations (AR 448-49), the  
11 ALJ also explained how this opinion was inconsistent with Dr. Kirkpatrick's treatment notes,  
12 which showed "consistently normal physical examinations," as well as the unremarkable imaging.  
13 (AR 24 (citing AR 357, 360, 366, 378).) As the ALJ noted, Dr. Kirkpatrick's opinion did not  
14 include any explanation for the exertional and postural limitations listed, and thus the contradictory  
15 treatment notes constitute a legitimate reason to discount Dr. Kirkpatrick's conclusions. *See*  
16 *Tommasetti*, 533 F.3d at 1041.

17 Because the ALJ provided at least one valid reason to discount Dr. Kirkpatrick's opinions  
18 regarding Plaintiff's physical and mental functioning, any errors in the ALJ's other reasoning is  
19 harmless. *See Carmickle v. Comm'r of Social Sec. Admin.*, 533 F.3d 1155, 1162-63 (9th Cir.  
20 2008).

21 Subjective symptom testimony

22 The ALJ discounted Plaintiff's allegations because (1) he worked for many years despite  
23 longstanding mental conditions, (2) his activities contradict his alleged limitations, and (3) his

1 mental limitations improved with medication and episodically worsened when he used  
 2 methamphetamine. (AR 20-22.) Plaintiff argues that these reasons are not clear and convincing,  
 3 as required in the Ninth Circuit. *Burrell v. Colvin*, 775 F.3d 1133, 1136-37 (9th Cir. 2014).

4 The ALJ's reasoning with regard to Plaintiff's ability to work despite longstanding mental  
 5 conditions is a clear and convincing reason to discount Plaintiff's allegations. *See, e.g., Drouin v.*  
 6 *Sullivan*, 966 F.2d 1255, 1258 (9th Cir. 1992) ("She was able to hold two previous jobs with a fair  
 7 amount of success, and even if those particular jobs are, as she claims, too taxing for her, the  
 8 vocational counselor testified that she is qualified for thousands of less strenuous jobs."). As noted  
 9 by the ALJ (AR 21), the treatment notes do not indicate that Plaintiff's mental conditions worsened  
 10 around the time of his alleged onset date, and instead reference Plaintiff's chronic mental health  
 11 conditions. (*See, e.g.*, AR 383-445.) The ALJ thus reasonably found that the fact that Plaintiff  
 12 had been able to work for years with the same mental conditions that he now claims are disabling  
 13 undermined his allegation that his inability to work now was the result of his impairments.

14 The ALJ also cited activities that contradict Plaintiff's allegations, which constitutes  
 15 another clear and convincing reason to discount Plaintiff's allegations. (AR 20-21.) The ALJ  
 16 referenced *inter alia* Plaintiff's ability to participate in work crew for the Department of  
 17 Corrections three days per week in September 2018, mow his aunt's lawn, help his elderly  
 18 neighbor with household chores, and attend recovery groups 1-2 times daily as well as recovery  
 19 conferences. (AR 20-21.) Plaintiff's participation in daily recovery groups contradicts his  
 20 testimony that he does not get out of bed 8-12 days per month because he sleeps all day. (*See* AR  
 21 51.) Although not all of the activities cited by the ALJ obviously contradict any of Plaintiff's  
 22 allegations, the ALJ noted both Plaintiff's allegation of sleeping all day approximately 10 days per  
 23 month as well as his claim that he attends recovery meetings 1-2 times per day, and this

1 inconsistency constitutes a clear and convincing reason to discount Plaintiff's allegations. *See Orn*  
2 *v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (activities may undermine a claimant's allegations  
3 where they (1) contradict the claimant's testimony or (2) "meet the threshold for transferable work  
4 skills").

5       Lastly, the ALJ did not err in finding that Plaintiff's treatment record undermined his  
6 allegation of disabling mental limitations. (AR 21-22.) As noted by the ALJ, the record showed  
7 that Plaintiff's symptoms worsened in the context of methamphetamine use, but that when Plaintiff  
8 was not using substances and was compliant with his medication regimen, his psychological  
9 functioning was normal. (AR 21-22.) This evidence contradicts Plaintiff's allegations of disabling  
10 mental limitations and supports the ALJ's determination. *See Wellington v. Berryhill*, 878 F.3d  
11 867, 876 (9th Cir. 2017) ("[E]vidence of medical treatment successfully relieving symptoms can  
12 undermine a claim of disability."); *Carmickle*, 533 F.3d at 1161 ("Contradiction with the medical  
13 record is a sufficient basis for rejecting the claimant's subjective testimony."); *Warre v. Comm'r  
14 of Social Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006) ("Impairments that can be controlled  
15 effectively with medication are not disabling for the purpose of determining eligibility for SSI  
16 benefits.").

Because the ALJ provided multiple clear and convincing reasons to discount Plaintiff's allegations, the Court affirms this portion of the ALJ's decision.

### Lay evidence

20 Plaintiff's friend and his mother wrote statements describing his mental symptoms. (AR  
21 254-55.) The ALJ summarized the statements and found them inconsistent with Plaintiff's  
22 "objective evidence, treatment history, and demonstrated level of functioning, as discussed  
23 throughout this decision." (AR 25.)

1 An ALJ's reasons to discount a lay statement must be germane. *See Dodrill v. Shalala*, 12  
2 F.3d 915, 919 (9th Cir. 1993) ("If the ALJ wishes to discount the testimony of the lay witnesses,  
3 he must give reasons that are germane to each witness."). Plaintiff argues that the ALJ's reasoning  
4 is conclusory and unexplained. Dkt. 11 at 14.

5 The Court disagrees. The ALJ thoroughly discussed the objective evidence, Plaintiff's  
6 treatment history, and Plaintiff's activities in the decision (AR 20-22) and relied on that discussion  
7 to discount Plaintiff's subjective allegations, which are similar to the allegations of Plaintiff's  
8 friend and mother. This reasoning is germane to the lay statements. *See Lewis v. Apfel*, 236 F.3d  
9 503, 511 (9th Cir. 2001) ("One reason for which an ALJ may discount lay testimony is that it  
10 conflicts with medical evidence."); *Carmickle*, 533 F.3d at 1164 (finding that reference to a  
11 claimant's inconsistent activities is a germane reason to discount a lay statement). Thus, the Court  
12 affirms this portion of the ALJ's decision.

13 **CONCLUSION**

14 For the reasons set forth above, this matter is REVERSED and REMANDED for further  
15 administrative proceedings.

16 DATED this 15th day of September, 2020.

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18   
19 Mary Alice Theiler  
20 United States Magistrate Judge  
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